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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BEVERLY BERNELL MYRES, Plaintiff and Appellant, v. SAN FRANCISCO HOUSING AUTHORITY, Defendant and Appellant.	A140332 (San Francisco City and County Super. Ct. No. CGC-12-519978)

The San Francisco Housing Authority (SFHA) appeals from a judgment after jury trial, in which its former employee, Beverly Bernell Myres, prevailed on a claim of disability harassment, under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.).[1] SFHA primarily contends that that the jury's harassment verdict is not supported by substantial evidence. Myres also appeals from the judgment, arguing that various evidentiary and instructional errors affected the jury's verdicts in favor of SFHA on her causes of action for failure to reasonably accommodate her disability (§ 12940, subd. (m)), failure to engage in the interactive process (*id.*, subd. (n)), retaliation (*id.*, subd. (h)), and wrongful discharge in violation of public policy (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167).

We agree with SFHA that the rate of postjudgment interest awarded should not have exceeded 7 percent but find no other prejudicial errors. Accordingly, we will order

[1] Undesignated statutory references are to the Government Code.

the judgment modified with respect to postjudgment interest, but affirm it in all other respects.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2006, SFHA hired Myres as a claims assistant. In 2007, Myres was promoted to workers' compensation analyst in SFHA's human resources department (the department). During the relevant time period, SFHA's executive director was Henry Alvarez. Myres was a member of the San Francisco Municipal Executives' Association, and her employment with SFHA was governed by a union memorandum of understanding (MOU).

On April 16, 2009, Myres injured her right knee at work when she tripped on a cord. Myres waited several months, hoping that her injury would heal, but eventually sought medical treatment and filed a workers' compensation claim in June 2009. Myres continued to work full-time without any work restrictions until she had surgery on her right knee on February 11, 2010, after which she was on leave until May 19, 2010.

While Myres was out on leave, the department relocated its office. Due to construction at the new office, and at her doctor's recommendation, Myres inspected the office for tripping hazards on May 4, 2010. Myres did not identify any problems with the new location.

On May 13, 2010, Myres was released by her doctor to return to modified work with the following restrictions: "Seated work—stand/walk for personal needs only. No lift over 10 lbs. No drive for work. Must work in location free from tripping hazards." Myres spoke to her direct supervisor, human resources director Phyllis Moore-Lewis, that same day and on several other occasions between May 13 and May 19. Moore-Lewis testified that she told Myres SFHA could accommodate her restrictions. It was agreed that Myres was to work three four-hour days the week of May 18 and five four-hour days the week of May 24.

On May 19, 2010, Myres returned to work, on crutches, on the agreed part-time basis. At the new office space, the photocopier and fax machine were located approximately 50 feet away from Myres's desk. Moore-Lewis testified that she

instructed both Myres and Nikia Armstrong, who was the support person for the department, that Armstrong should help Myres with copy/fax duties.[2] Moore-Lewis testified that Myres never complained of any problems using the photocopier.

Upon returning to work in May 2010, Myres experienced increased pain in her left knee. Originally, Myres's treating physician did not believe an injury occurred which warranted workers' compensation coverage of Myres's left knee. SFHA's retained expert on orthopedic surgery, Dave Miles Atkin, M.D., testified at trial that Myres's left knee pain was due to arthritis. Myres, on the other hand, attributed her left knee pain to the walking she had to do at work to make photocopies or send faxes. She attempted to see her physician on June 10, 2010, and again attempted to make an appointment on June 11. On Saturday, June 12, 2010, Myres went to the Kaiser acute walk-in clinic for her left knee pain. She complained that her job required her to do a significant amount of walking, despite her physician's work restrictions, and was taken off work.

Meanwhile, on the afternoon of June 11, 2010, SFHA had advised the entire department, except Moore-Lewis, that they were being laid off as a result of departmental restructuring. July 26, 2010, was the effective date of separation. Because Myres only worked a half day on June 11, 2010, which was a Friday, she did not receive the layoff notice via hand-delivery that afternoon, as did other employees. Instead, notice of the layoff was mailed to her and faxed to her union representative. Myres did not receive her layoff notice in the mail until June 17, 2010. As a result of the delay, Myres's official date of separation was extended to September 1, 2010.

According to SFHA, Myres and the rest of the department were laid off for a legitimate reason. Alvarez testified that he and Moore-Lewis decided, with the approval of SFHA's board of commissioners, to restructure the department for improved

[2] Myres disputed Moore-Lewis's version of events. Armstrong also testified that Moore-Lewis did not ask her to help Myres with photocopying or faxing. Nonetheless, if any department staff had needed assistance with copying or faxing, they could have sent Armstrong an e-mail or picked up the telephone, and she would have done it. Myres never asked Armstrong for such assistance.

efficiency. In his words, "[SFHA] needed a different skill set to get the work done that we had to get done." Moore-Lewis testified that the restructuring was due to reduced federal funding and a budget shortfall.

Myres, on the other hand, asserted that SFHA retaliated against her for taking workers' compensation leave. In support of this contention she called Roger Crawford, SFHA's former special assistant to the executive director, who testified that "[t]here were a number of people in the department . . . that [Alvarez and Moore-Lewis] were having trouble with. So they decided to deal with the problem by restructuring and laying everybody off." As a result of the layoff, Myres testified that she suffered a loss of her annual salary of approximately $81,000 for almost three years, as well as fringe and retirement benefits.

On June 14, 2010, Myres's doctor concluded that Myres's left knee pain was due to overcompensation for her injured right knee. Myres remained out on disability through her date of separation. She has since received workers' compensation benefits paid for by SFHA, including temporary and permanent disability covering the injury to both knees. In September 2011, her condition became permanent and stationary. At the time of trial, Myres had received approximately $101,000 in workers' compensation benefits.

Myres sued SFHA. Myres's first three causes of action are each titled "Disability Discrimination" and cite section 12940, subdivision (a), but Myres has not properly pleaded such a claim. She does not substantively allege that she was subjected to an adverse employment action because of her physical disability, which is the basis of such a claim. (§ 12940, subd. (a).) Instead, she alleges: (1) failure to engage in the interactive process (§ 12940, subd. (n)); (2) failure to accommodate disability (*id.*, subd. (m)); (3) hostile work environment harassment (*id.*, subd. (j)); (4) retaliation (*id.*, subd. (h)); and (5) wrongful discharge in violation of public policy. Specifically, Myres claimed that Moore-Lewis was too busy to meet with her to engage in the interactive process and that, "[a]s a direct result of [SFHA's] failure to engage in the interactive process, [Myres] was deprived of options that would have allowed her to perform her work without

harming herself." Myres alleged: "[SFHA] failed to recognize [Myres's] restrictions on walking except for personal reasons and [Myres] often had to walk to the far end of the office in order to access the copy or fax machines. Although [SFHA] could easily have relocated these machines to be more central and more accessible or . . . have found any other reasonable accommodation that would allow [Myres] to perform her job without injuring herself, [SFHA] failed to accommodate her." Myres also alleged, "As a direct result of [SFHA]'s failure to accommodate [her] disability, her condition worsened."

Myres's cause of action for hostile work environment harassment was based on comments made by Alvarez, which are detailed below. Myres's retaliation and wrongful discharge in violation of public policy causes of action were premised on her allegations of retaliation for taking workers' compensation leave.

After trial, the jury returned verdicts in favor of SFHA on four of the five causes of action. With respect to hostile work environment harassment, the jury found in Myres's favor and awarded her $35,000 in noneconomic damages. With respect to Myres's cause of action regarding failure to engage in the interactive process, the jury found, in special verdicts, that SFHA "fail[ed] to participate in a timely, good-faith interactive process with [Myres] to determine whether a reasonable accommodation could be made," but found that such failure was not "a substantial factor in causing harm to [Myres]." With respect to the failure to accommodate cause of action, the jury agreed (11 to 1) that Myres was able to perform the essential job duties of her position with reasonable accommodation for her disability, but did not agree (9 to 3) that SFHA had "fail[ed] to provide reasonable accommodation for [Myres's] physical disability."

On September 13, 2013, the trial court entered judgment in Myres's favor in "the total sum of $35,000 with interest to accrue thereon at the rate of 10% per annum until paid."[3] SFHA filed a timely notice of appeal from the judgment, and Myres filed a timely notice of cross-appeal.

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[3] Myres was also awarded attorney fees and costs. That postjudgment order is the subject of a separate appeal and cross-appeal (No. A141107) pending before this court.

II. DISCUSSION

On appeal, SFHA argues: (1) that the jury's verdict on hostile work environment harassment is not supported by substantial evidence; (2) that misconduct by Myres's counsel likely impacted the verdict; and (3) that the trial court erred in imposing postjudgment interest at a rate in excess of 7 percent. In her cross-appeal, Myres contends that the trial court abused its discretion by (1) excluding certain expert testimony; (2) excluding certain evidence on attorney-client privilege grounds; (3) admitting medical causation evidence; (4) excluding critical "me too" evidence; (5) admitting an irrelevant release signed by Myres; and (6) admitting collateral source evidence and instructing the jury to deduct such income from any backpay award. For clarity's sake, we take several arguments out of order and address Myres's cross-appeal first.[4] None of the arguments requires reversal of the judgment.

A. *Myres's Cross-Appeal*

In her cross-appeal, Myres raises numerous challenges to the trial court's evidentiary and instructional rulings. She contends: "[B]ut for the trial court's repeated legal errors . . . , it is reasonably probable that [she] would have prevailed not only on her harassment claim, but on her claims for failure to engage in the interactive process, failure to accommodate, retaliation, and wrongful termination as well."

Preliminarily, we observe that in many instances Myres has divorced her analysis from its factual and procedural underpinnings. Most of her arguments contain few, if any, supporting record citations. For instance, she challenges evidentiary rulings, but often fails to cite the record for the relevant motion in limine, or even indicate where the trial court's disputed ruling appears in the reporter's transcript. Instead, the record is only cited in any detail in her opening brief's lengthy statement of the case and the facts. Even there, she does not rectify many of the previously mentioned omissions. This practice is

[4] Because we conclude that Myres cannot recover on her retaliation and wrongful termination claims as a matter of law, we need not consider her argument that the trial court abused its discretion by excluding "me too" evidence that Alvarez retaliated against employees taking leave under the Family and Medical Leave Act.

extremely vexing to the court and is grounds for declaring Myres's appellate arguments forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Lona v. Citbank, N.A.* (2011) 202 Cal.App.4th 89, 96–97, fn. 2 [it is appellant's duty to support arguments with reference to the record, including page citations for any procedural matters, "regardless of where the reference occurs in the brief"]; *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826–827, fn. 1 ["[i]t is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references"].) Nevertheless, we consider Myres's arguments on the merits, based on our independent review of the record and the SFHA's response.

We review the trial court's evidentiary rulings for abuse of discretion. (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 295 (*McCoy*).)

1. *Statutory Background*

"FEHA prohibits as an unlawful employment practice, unless based upon a bona fide occupational qualification, the discharge of an employee because of the employee's physical disability (§ 12940, subd. (a)) except when the employee's disability renders the employee 'unable to perform his or her essential duties even with reasonable accommodations . . . .' (§ 12940, subd. (a)(1); see *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160 [(*Moorpark*)].)" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222, fn. omitted.) "In addition to a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer's failure to provide a reasonable accommodation for an applicant's or employee's known disability. (§ 12940, subds. (a), (m).) 'Under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself.' [Citations.] Similar reasoning applies to violations of . . . section 12940, subdivision (n), for an employer's failure to engage in a good faith interactive process to determine an effective accommodation, once one is requested. (§ 12940, subd. (n) . . . .) [¶] Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage

in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.] While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54.)

This case involves the intersection of FEHA and workers' compensation law. Workers' compensation is typically the exclusive remedy for injuries suffered on the job. (Lab. Code, § 3600.) However, in *Moorpark, supra,* 18 Cal.4th 1143, our Supreme Court held that Labor Code section 132a, prohibiting discrimination against workers who were injured in the course and scope of their employment, does not provide the exclusive remedy for disability discrimination and does not preclude pursuit of FEHA or common law wrongful termination remedies. (*Moorpark,* at pp. 1160–1161.) Thus, an employee who suffers an industrial injury can sue for disability discrimination under FEHA in addition to the remedies provided in workers' compensation law, subject to credits to prevent double recoveries. (*Id.* at pp. 1148, 1158, 1161.) The Third District relied on *Moorpark* to conclude that the Workers' Compensation Act does not provide the exclusive remedy for a plaintiff pleading a FEHA claim under section 12940, subdivision (m), for damages based on physical injuries suffered due to an employer's failure to provide reasonable accommodation. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 351–352, 366–368.)

"To state a claim of retaliation under FEHA, a plaintiff must show (1) [s]he engaged in a protected activity, (2) [s]he was subjected to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action. [Citations.]" (*Rope v. Auto-Chlor System of Washington, Inc*. (2013) 220 Cal.App.4th 635, 651.) "To establish a claim for wrongful discharge in violation of public policy, a plaintiff must plead and prove (1) a termination or other adverse employment action; (2) the termination or other action was a violation of a fundamental public policy, as expressed in a constitutional, statutory, or regulatory provision; and (3) a

nexus between the adverse action and the employee's protected status or activity. [Citation.]" (*Id.* at p. 660.)

2. *Collateral Source Evidence*

Myres maintains that the trial court erred by admitting collateral source evidence and instructing the jury that it must deduct from any backpay award the amount she received in social security disability benefits, state disability benefits, and pension benefits.

"The collateral source rule . . . precludes deduction of compensation the plaintiff has received *from sources independent of the tortfeasor* from damages the plaintiff 'would otherwise collect from the tortfeasor' [citation] . . . ." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 548, italics added.) "The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. . . . If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.) "The idea is that tortfeasors should not recover a windfall from the thrift and foresight of persons who have actually or constructively secured insurance, pension or disability benefits to provide for themselves and their families." (*Arambula v. Wells* (1999) 72 Cal.App.4th 1006, 1009.)

a. *Background*

Myres filed a motion in limine to exclude evidence of collateral sources of income. She argued that any such evidence was irrelevant, as it could not be used to offset a backpay award on her retaliation and wrongful discharge causes of action. The trial court denied the motion, saying, "That's denied as to the worker's comp disability and the unemployment benefits that she's gotten. Money that comes from taxes and other things that the employer pays, I don't believe that's a collateral source." The trial

court also allowed SFHA to admit evidence of social security disability benefits received by Myres.

Over Myres's "collateral source" objection, SFHA's expert economist, Joseph Penbera, Ph.D., detailed the payments Myres received from retirement, social security disability, and worker's compensation disability between September 1, 2010, and the date of trial. Ultimately, Penbera opined that there was only a $500 difference between Myres's expected compensation, had she remained employed by SFHA, versus the compensation she received in retirement and disability benefits after separation. On cross-examination, Penbera admitted that Myres had contributed to her own social security and disability funds. Myres disputed the economist's numbers and testified that her pension benefits had been funded by her previous employers as well as SFHA.

At the conclusion of testimony, the jury was instructed: "If you decide that [Myres] was harmed and that the [SFHA's] improper conduct, if any, was a substantial factor in causing the harm, you must decide how much money will reasonably compensate her for the harm. This compensation is called damages. [¶] . . . To recover damages for past lost earnings, [Myres] must prove the amount of income she has lost to date. [¶] . . . [¶] *The amount of any backpay award must be reduced by the amount of workers' compensation disability benefits, social security disability benefits, state disability benefits, and pension benefits* [*Myres*] *received after discharge*."[5] (Italics added.)

In closing argument, defense counsel repeatedly referenced the collateral source evidence and instruction. He argued, "[Alvarez is] not the one asking you for money after receiving close to $300,000 already from [SFHA] in comp disability, pension." Defense counsel also argued: "She is off work because she's got osteoarthritis, and she's

[5] The jury was also given the following general instruction: "You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and evidence." Neither party notes the apparent inconsistency between these two instructions.

not working. . . . There isn't even a basis to make a claim for backpay or front pay because she couldn't work, but it's even more than that because the benefits under amounts received versus the [workers'] compensation package, it's 238,000 and it was a $536 difference. . . . [A]nd you have it on your jury instruction, state disability is also included in the offset, and she has been getting state disability something along the lines of . . . almost $30,000 a year. [¶] If you add that the 238, she's actually $36,000 ahead. . . . Not to mention—a juror asked, is this taxable or is it not. Well, no, what she's getting is not taxable. What she was getting before the layoff was. So it's a dramatic difference. It's a plus for her. There's no loss. [¶] I won't say she's made money by going on disability but it's almost like that. [¶] . . . It is like 88,000—it's even more not taxed. She was getting 81. She's making a damage claim. You have to show damage. [¶] Ladies and gentlemen, [Myres] has done really well. . . . This is a case where it's time to say enough is enough."

b. *Analysis*

"The collateral source rule has an evidentiary as well as a substantive aspect. Because a collateral payment may not be used to reduce recoverable damages, evidence of such a payment is inadmissible for that purpose. Even if relevant on another issue (for example, to support a defense claim of malingering), under Evidence Code section 352 the probative value of a collateral payment must be 'carefully weigh[ed] . . . against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations.' (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 732.)" (*Howell v. Hamilton Meats & Provisions, Inc., supra,* 52 Cal.4th at p. 552.) Myres contends that the trial court violated both aspects of the collateral source rule.

Myres appears to concede that the trial court did not err in admitting evidence of her receipt of worker's compensation disability benefits. (*Bevli v. Brisco* (1989) 211 Cal.App.3d 986, 994.) But she argues that the trial court erred in not applying the collateral source rule with respect to state disability, social security disability, and pension benefits she "derived from a 40-year career (only a fraction of which was spent working for [SFHA])." Although there is conflict among federal courts and, accordingly,

some authority to support SFHA's and the trial court's position (see Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2014) ¶¶ 17:175 to 17:177, pp. 17-26 to 17-27), we will assume that pension, social security, and disability benefits are collateral sources from which a tortfeasor should not benefit, *even if the tortfeasor is the employer*. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 877 ["[h]ad plaintiff actually retired and taken her retirement pension, we are convinced the trial court would have been required to exclude evidence of plaintiff's retirement benefits as a collateral source"]; *Rotolo Chevrolet v. Superior Court* (2003) 105 Cal.App.4th 242, 245–247 [disability pension payments are collateral source not to be offset against lost earnings damages when tortfeasor is not employer]; *McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1226 [social security benefits are "classic collateral source"]; *McQuillan v. Southern Pacific Co.* (1974) 40 Cal.App.3d 802, 807–808 [death benefits received from PERS retirement fund are collateral sources not to be offset against state employer's wrongful death damages]; see also *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1434–1435 [employer " 'cannot take advantage of the fortuitous circumstance of a disability of the employee during the period of discharge without first having purged itself of its own wrong by offering to reinstate the employee' "].)

Myres contends that the trial court's error was prejudicial with respect to her causes of action for retaliation and termination in violation of public policy.[6] "No judgment shall be set aside . . . on the ground of misdirection of the jury, or of the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; accord, Evid. Code, § 353, subd. (b).) Reversal is required only if it appears reasonably probable that a result more favorable to Myres would have been reached absent the error. (*Daly v.*

[6] Backpay was not recoverable on the hostile work environment harassment claim, on which Myres prevailed. Nor was backpay recoverable on her claim for failure to engage in the interactive process or failure to provide reasonable accommodation.

General Motors Corp. (1978) 20 Cal.3d 725, 746; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853.) "[A] 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. [Citations.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics omitted.)

The jury made clear in its special verdict that it did not reach the question of damages on Myres's claims for wrongful discharge and retaliation. Nonetheless, we ordinarily would be compelled to agree with Myres that the trial court's unlimited admission of collateral source evidence, combined with its explicit instruction and defense counsel's argument to the jury, may well have been inherently prejudicial to the jury's liability findings on such causes of action. (See *Howell v. Hamilton Meats & Provisions, Inc., supra,* 52 Cal.4th at p. 552 ["[a]dmission of evidence of collateral payments may be reversible error even if accompanied by a limiting instruction directing the jurors not to deduct the payments from their award of economic damages"]; *Hrnjak v. Graymar, Inc., supra,* 4 Cal.3d at p. 732 [noting "inevitable prejudicial impact [collateral source] evidence is likely to have on the jury's deliberations"]; *Green v. Denver & R.G.W. R.R.* (10th Cir. 1995) 59 F.3d 1029, 1033 ["[t]he major reason for excluding collateral source evidence is the concern that juries will be more likely to find no liability if they know that plaintiff has received some compensation"].)

In this case, however, we find it unnecessary to remand for a new trial. Under section 12940, subdivision (h), it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person *has opposed any practices forbidden under this part* or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Italics added.) We agree with SFHA that, as a matter of law, Myres could not recover for FEHA retaliation on the basis that she was terminated for taking workers' compensation leave. Taking workers' compensation leave is not protected activity under FEHA. (See *Rope v. Auto-Chlor System of Washington, Inc., supra,* 220 Cal.App.4th at pp. 652–653 [plaintiff's request for paid leave was not "protected activity" within the meaning of § 12940,

subd. (h); plaintiff did not oppose employer practices based on reasonable belief that such practices violate FEHA].)

Without a violation of FEHA to rely on, Myres also cannot prevail on a cause of action for wrongful termination in violation of public policy. (See *Moorpark, supra,* 18 Cal.4th at p. 1159 ["when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action"]; *Rope v. Auto-Chlor System of Washington, Inc*., *supra*, 220 Cal.App.4th at p. 660 & fn. 15; *Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 755 [Lab. Code, § 132a cannot form the basis of a common law action for wrongful termination in violation of public policy].) We are not persuaded by Myres's attempts to distinguish *Rope* and *Dutra* by reframing her retaliation cause of action as a disability discrimination cause of action, under section 12940, subdivision (a). Perhaps Myres could have pleaded such a cause of action, but she did not. Nor did she rely on this theory at trial. Because Myres is not entitled to recover on her retaliation and wrongful termination claims as a matter of law, the trial court's collateral source error was harmless.

3. *Medical Causation*

Myres also contends the trial court abused its discretion in admitting SFHA's evidence that her left knee was not harmed during the period of modified duties and that, instead, her left knee pain was caused by arthritis. She asserts that this causation evidence should have been excluded as irrelevant and unduly prejudicial because "a disabled worker does not have to prove the cause of [her] disability."

a. *Background*

At trial, Myres sought to exclude testimony of SFHA's medical expert regarding medical causation, arguing that such evidence was irrelevant to a "disability discrimination" case. Myres's counsel argued: "[W]e are allowed to claim that it pained her to walk back and forth without having to show that there was a cause, a medical causation. . . . [¶] . . . [¶] [N]ot only was it the pain and suffering but it was also ultimately the loss of her job that was the damage." The trial court disagreed, saying

"[t]hat's a different cause of action" and "the issue . . . for any medical expert . . . is whether . . . any particular thing or activity that [Myres] engaged in in the 13 days that she was there caused her physical harm." The court explained: "[W]hether or not [Myres] was harmed during this 13 days or three-week period that she was at work. That's a medical issue."

Atkin, SFHA's medical expert, testified that Myres suffered from "osteoarthritis of both her knees," and gave his opinion that her left knee was not harmed during the period of modified duties. Myres moved to strike Atkin's testimony as irrelevant. The trial court denied the motion to strike, and Myres's subsequent motion for mistrial. The court again explained that "there is a limited medical causation issue that arises in the nature of her claims and it's a causation issue concerning [pain and suffering for] the 13 days that she was at work . . . ."

b. *Analysis*

Myres argues, in her opening brief: "To prove her disability claims of failure to engage and failure to accommodate, [she] had no obligation to prove the medical causation of her disability."[7] Her argument is both legally and factually flawed. Contrary to Myres's suggestion, the trial court merely determined that causation was an issue with respect to the harm to her left knee that she said was the result of SFHA's failures to engage in the interactive process and accommodate her disability.

The trial court was also legally correct that causation was at issue. First, we must reiterate that, contrary to both parties' apparent misconceptions, Myres did not substantively assert a cause of action for "disability discrimination" under section 12940, subdivision (a). A claim for failure to accommodate, brought under subdivision (m) of section 12940, is different from a disability discrimination claim under subdivision (a) of the statute. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255–256.) "Under

[7] We do not discuss Myres's argument, raised for the first time in her reply brief, that the trial court abused its discretion in granting SFHA's motions in limine Nos. 9 and 12. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself." (*Id.* at p. 256.)

The essential elements of a cause of action for failure to reasonably accommodate a disability are: (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, (3) the employer failed to reasonably accommodate the plaintiff's disability, (4) *the plaintiff was harmed,* and (5) *the employer's failure to provide a reasonable accommodation was a substantial factor in causing plaintiff's harm.* (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009–1010; *Bagatti v. Department of Rehabilitation, supra,* 97 Cal.App.4th at pp. 353–356; CACI No. 2541.)[8] Thus, Myres had the burden to prove that her claimed damages—including pain and suffering—were causally connected to the asserted failure to reasonably accommodate her disability. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 952; CACI Nos. 2541, 2546.)

Medical testimony is not a prerequisite to proof of pain and suffering. The issue may be established by the plaintiff's own testimony. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 895; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 413.) Myres presented such testimony. The trial court, however, did not abuse its discretion in admitting expert medical testimony suggesting that Myres's pain and suffering was attributable to Myres's preexisting condition rather than SFHA's conduct.

4. *Attorney-Client Privilege*

Myres next argues that the trial court erred by sustaining certain privilege objections by SFHA. She limits her challenge to excluded testimony regarding reasons

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[8] The elements of a cause of action for failure to engage in an interactive process are: (1) the plaintiff has a disability that was known to her employer, (2) the plaintiff requested that her employer make a reasonable accommodation for that disability so she would be able to perform the essential job requirements, (3) the plaintiff was willing to participate in an interactive process to determine whether a reasonable accommodation could be made, (4) the employer failed to participate in a timely, good faith interactive process with the plaintiff, (5) *the plaintiff was harmed,* and (6) *the employer's failure to engage in a good faith interactive process was a substantial factor in causing the plaintiff's harm.* (CACI No. 2546.)

for the layoff, as communicated by Alvarez during meetings between Alvarez, Moore-Lewis, Roger Crawford, and SFHA's assistant general counsel, Tim Larsen. Specifically, Myres maintains that "the court's ruling . . . violates well-established case law that to assert privilege, the dominant *motive* of a communication be for obtaining legal advice . . . ." She contends that the ruling was prejudicial because Crawford's testimony would have illuminated Alvarez's discriminatory motive for terminating Myres. Again, we note that Myres did not properly plead a disability discrimination cause of action, under section 12940, subdivision (a).

a. *Background*

Roger Crawford was called to testify by Myres. Crawford testified that he became SFHA's assistant general counsel in 2007. Although his title "never officially changed," he took an acting assignment as a special assistant to the executive director in the fall of 2008. Alvarez was his direct supervisor.

In a subsequent series of hearings outside of the jury's presence, Crawford testified that his role was not to provide legal counsel to Alvarez when he served as special assistant to the director. Instead, he "assisted [Alvarez] with the day-to-day operations of the [SFHA.]" However, Crawford also testified that, in 2010, he "would sit in the counsel's chair at the commission meetings" and continued to provide legal advice to the commission where Alvarez was present.

Myres challenges the exclusion of testimony regarding statements made by Alvarez during meetings with Crawford, Moore-Lewis, and Larsen in Alvarez's office. Although Crawford testified that he was giving "business advice," Alvarez testified that "is absolutely untrue." Alvarez testified the change in title was only to provide Crawford with an increase in pay, and Crawford continued to provide legal advice on labor and employment matters. For instance, Crawford continued to advise on labor and employment matters and assisted in the drafting of layoff notices. Alvarez testified: "Primarily, Mr. Larsen did all the transactional activities, but many times, Mr. Larsen and Mr. Crawford didn't agree. So I had to bring them together to have them explain to me why they disagreed or why they had a different opinion . . . . [¶] And I would decide

whose advice I would typically use, but I would use both of them to get the information that I needed in order to make decisions."

The trial court determined that SFHA established the necessary elements to maintain the attorney-client privilege for statements Alvarez made in private board of commissioners meetings on the restructuring, as well as during meetings in Alvarez's office involving Crawford, Alvarez, Moore-Lewis, and Larsen.

b. *Analysis*

"The attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371.) The attorney-client privilege confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ." (Evid. Code, §§ 953, 954.) "Its fundamental purpose 'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.] . . . [¶] Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. . . . '[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.' [Citation.]" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco*).)

"The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. [Citations.]" (*Costco, supra,* 47 Cal.4th at p. 733.) Myres maintains that

SFHA cannot assert the attorney-client privilege because Crawford was not acting as its counsel at the time the disputed communications were made.[9]

"[A] communication does not fall within the attorney-client privilege unless the *dominant purpose* of the communication is a furtherance of the attorney-client relationship. [Citation.]" (*Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 31.) "The privilege does not apply to communications to an attorney who is transacting business that might have been transacted by another agent who is not an attorney. [Citation.]" (*Id.* at p. 32.) Thus, "the attorney-client privilege does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice. [Citations.] For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco, supra,* 47 Cal.4th at p. 735.)

Myres argues that the dominant purpose test cannot be met because Crawford was not acting as SFHA's attorney. "Whether a particular communication is predominantly in furtherance of the attorney-client relationship is a question of fact [citation]," which we review for substantial evidence. (*Montebello Rose Co. v. Agricultural Labor Relations Bd., supra,* 119 Cal.App.3d at p. 33; *Sierra Vista Hospital v. Superior Court* (1967) 248 Cal.App.2d 359, 364.) Crawford testified that he was not acting as legal counsel to Alvarez when he served as special assistant to the director. Instead, he "assisted [Alvarez] with the day-to-day operations of the [SFHA]" and gave "business advice." However, Alvarez testified that this was "absolutely untrue." Alvarez testified that the change in title was only to provide Crawford with an increase in pay and that he

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[9] " '[L]awyer' means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." (Evid. Code, § 950.) " '[C]lient' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him *in his professional capacity* . . . ." (*Id.*, § 951, italics added.)

continued to provide legal advice on labor and employment matters. Substantial evidence supports the trial court's finding.

Next, Myres suggests that SFHA impliedly waived the privilege by giving Crawford a dual role within the organization and asserting that Myres was terminated for a legitimate reason. "[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action. [Citation.]" (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40.) However, Myres is mistaken in citing *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142 (*Chicago Title*) for the proposition that the attorney-client privilege has no application to in-house counsel serving dual business and legal roles.

In *Chicago Title*, plaintiff Chicago Title brought an action for fraud alleging the defendant bank knew of a "check kiting" scheme, did nothing to stop it, and in fact assisted the fraud. (*Chicago Title, supra*, 174 Cal.App.3d at pp. 1145–1147.) The defendant, on the other hand, claimed that Chicago Title not only knew of the fraudulent scheme, but itself was a willing participant. The defendant sought discovery from Chicago Title's in-house counsel, who was responsible for monitoring checks coming into and out of the accounts in question, regarding conversations he had with other Chicago Title employees. On a motion to compel the trial court found that the attorney-client privilege had been waived because the questions concerned the state of Chicago Title's knowledge of the fraud. (*Id.* at pp. 1147–1148, 1151.)

The court of appeal agreed, initially observing, "[T]he privilege may impliedly be waived. [Citations.] Such an implied waiver occurs where the plaintiff has placed in issue a communication which goes to the heart of the claim in controversy." (*Chicago Title, supra,* 174 Cal.App.3d at p. 1149, fn. omitted.) The court concluded: "[T]he protection of the privilege must be denied to [the in-house counsel] in his role of corporate counsel for two reasons. First, [the counsel's] actions as . . . legal counsel were so intertwined with activities which were wholly business or commercial that a clean distinction between the two roles became impossible to make. This merging of business

and legal activities jeopardizes the assertion of the attorney-client privilege, since the attorney and the client in effect have become indistinguishable. The second reason, which in part results from the first, is that [the counsel's] dual role as both business agent and attorney provided him with the most comprehensive awareness of the [disputed] relationship, both prior to and during the alleged fraud. . . . Clearly [the attorney], in his dual role of business agent and attorney, is the person who most thoroughly can attest to the knowledge of the corporate entity. . . . [¶] . . . This is not to say that solely by bringing an action in fraud the attorney-client privilege disappears; *nor are we asserting that the employment of in-house counsel, standing alone, erodes the privilege*. We merely find that . . . the facts of this case . . . result[ed] in the implied waiver of the attorney-client privilege." (*Id.* at p. 1154, italics added.)

Here, unlike *Chicago Title*, Crawford's state of mind was not put at the heart of the dispute. Rather, the real issue was Alvarez's state of mind and the reasons for the layoff, which could be, and were, ascertained directly from Alvarez. (*Chicago Title, supra,* 174 Cal.App.3d at p. 1151; see also *Kaiser Foundation Hospitals v. Superior Court* (1998) 66 Cal.App.4th 1217, 1227 ["[w]here a defendant has produced its files and disclosed the substance of its internal investigation conducted by nonlawyer employees, and only seeks to protect specified discrete communications which those employees had with their attorneys, disclosure of such privileged communications is simply not essential for a thorough examination of the adequacy of the investigation"].)

Finally, Myres asserts that, even though it is undisputed that Larsen served as SFHA's attorney at all relevant times, SFHA failed to establish the requirements for asserting the privilege because Alvarez "waived any such privilege by making the communications in question in rooms full of people who were not shown as being reasonably necessary for the transmission of information or the accomplishment of the purpose of the allegedly protected communication."

Specifically, Myres complains that the trial court improperly limited the nonconfidential communications about which Larsen could testify to communications that occurred in the presence of at least one other person, "other than who [Larsen] would

be giving advice to." However, Myres does not cite any authority supporting her theory that the trial court's interpretation was too narrow. She cites only Evidence Code, section 952, which provides: " '[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship *and in confidence by a means which, so far as the client is aware, discloses the information to no third persons* other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Italics added.) "The term 'confidential communication' is broadly construed, and communications between a lawyer and his client are presumed confidential, *with the burden on the party seeking disclosure to show otherwise*. [Citations.]" (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557; accord, Evid. Code, § 917, subd. (a).) Myres has not met her burden to show that the trial court prevented the disclosure of any communications that were not confidential.

5. *Exclusion of Expert Testimony*

a. *Ann Noel*

Myres also argues that the trial court abused its discretion in excluding the testimony of Myres's retained expert witness, Ann Noel. Noel, who is an employment attorney, was offered as an expert on the law regarding reasonable accommodation and the interactive process. We generally review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*); *Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 25.)

Assuming arguendo that the issue is not forfeited, we have independently reviewed the record and agree with SFHA that the trial court did not abuse its discretion. Prior to trial, SFHA filed a motion in limine seeking to exclude Noel's testimony on the grounds her opinions were unreliable, speculative, and outside the area of her designated

expertise. (Evid. Code, §§ 402, 720, subd. (a), 801, subd. (b).) Essentially, SFHA argued that Noel's legal opinion would not be helpful to the jury and would invade the role of the judge. In opposing the motion, Myres argued: "Reasonable accommodations and engaging in the interactive process have a specific meaning within the law. . . . As such, having an expert who can define these terms and give life to the processes they encompass would be helpful to the trier of fact."

The trial court granted SFHA's motion, without prejudice, reasoning that expert testimony on the "interactive process," "reasonable accommodation," and the definition of a "disability" under California law would not be helpful to the jury. Myres asked the court to reconsider its ruling. The trial court reserved its ruling until after Myres and Moore-Lewis had testified. Thereafter, the trial court ruled, "[T]here may be plenty of need in other cases. [¶] In this case, I do not feel that expert testimony on reasonable accommodation is necessary because the issue of whether she was reasonably accommodated has become a question of credibility. There is no dispute what the restrictions were. It's pretty clear to me that if she was given what [Moore-Lewis] says that [Myres] was offered that that would have been reasonable accommodation. [¶] . . . [¶] [I]f it turns out to be found as a fact by the jury that as [Myres] claims that she needed those accommodations and didn't get them, then that would establish the validity of the claim. [¶] I think that the instructions carried the jury through the essential elements of the workings of the interactive process, and since . . . the needed accommodations . . . have basically been agreed upon, the issue is, did she get them or did she not. . . . The experts can't say who is telling the truth in this case."

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony

relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801.)

Myres does not address the trial court's main reason for excluding expert testimony—that the subject matter was not "sufficiently beyond common experience" and would not assist the jury. (Evid. Code, § 801, subd. (a).) In other words, "[e]xpert opinion should be excluded ' "when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.' " ' [Citations.]" (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291.) Myres offered Noel for her interpretation of the law. Expert opinion on a question of law is not admissible, as it invades the judge's role to instruct the jury on the law. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599; *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1181, 1185.) Expert testimony was not needed regarding the meaning of "reasonable accommodation." The jury was instructed: "A reasonable accommodation is a reasonable change to the workplace that allows an employee with a disability to perform the essential elements of the job. [¶] Reasonable accommodations may include the following: Making the workplace readily accessible to and usable by employees with disabilities, changing job responsibilities or work schedules, reassigning the employee to a vacant position, modifying or providing equipment or devices, modifying tests or training materials, providing qualified interpreters or readers, or providing other similar accommodations for an individual with a disability." Myres has shown no abuse of discretion.

b. *Tom Linder*

SFHA also filed a motion in limine seeking to exclude the expert testimony of Tom Linder, on the grounds his opinions were unreliable, speculative, and outside the area of his designated expertise. (Evid. Code, §§ 402, 720, subd. (a), 801, subd. (b).) Myres opposed the motion, maintaining that Linder should be permitted to testify that Myres would have been able to perform her regular job duties as a workers' compensation analyst had she been provided the accommodations she required. Further,

Linder was expected to testify that the types of accommodations Myres required would not have been prohibitively expensive.

The trial court granted SFHA's motion without prejudice saying, "I want to hear what happened here first." As she did with Noel, Myres also asked the court to reconsider its ruling with respect to Linder. Ultimately, the trial court declined.

Again, Myres does not address the trial court's main reason for excluding Linder's expert testimony—that the subject matter was not "sufficiently beyond common experience" and would not assist the jury. (Evid. Code, § 801, subd. (a).) Myres testified that SFHA could have moved the copier and fax machine to accommodate her disability. Moore-Lewis, on the other hand, testified that she told Armstrong to help Myres with copying, and that Myres was aware of this. In her reply brief, Myres suggests that Linder's testimony could have helped the jury resolve these "conflicts in the evidence." The jury did not need expert opinion to conclude that Myres would have been able to perform her regular job duties as a workers' compensation analyst, without prohibitive expense, in the event that she had been provided either accommodation. Once instructed on the law of reasonable accommodation under FEHA, the jury could evaluate the reasonableness of SFHA's actions as well as Linder could. The trial court did not abuse its discretion.

6. *Admission of Release*

Next, Myres argues that the trial court abused its discretion in admitting a "legally moot" release of claims under the governing MOU.

a. *Background*

Myres filed a motion in limine that sought to exclude a release, dated July 26, 2010, as irrelevant and unduly prejudicial (Evid. Code, § 352).[10] In that release, Myres

[10] Myres has not asserted, either on appeal or below, that Evidence Code section 1154 barred admission of the release: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it." (*Ibid.*) "[T]his

and her union representative agreed, in exchange for a severance package, to "release any and all claims arising under the [MOU] that [she or her union] may have against [SFHA.]" She argued that "Myres released her rights arising under the [MOU] and her right to not be discriminated against did not arise under this MOU." SFHA opposed the motion, contending that "[Myres] waived her current claims for disability discrimination and unlawful discharge by signing the Claims Release Form."

At argument on the motion, SFHA also asserted that the release also would go to the accommodation and interactive process issues in the case. "[T]he first step in the grievance is to raise this informally, to document it in writing. And none of this was done. . . . [T]his avenue was not pursued." The trial court denied the motion, explaining: "When it comes down to what testimony is going to come in, I'm going to give that a little bit more thought. [¶] . . . [¶] But right now, I think they can go into it. [¶] . . . [W]hether the grievance procedures are worth time going into in this trial, I don't know. The fact that her sign off ostensibly dealt with layoffs, I think that's enough to get it in, as far as relevancy is concerned*, and also regarding her evaluation . . . of her own problems regarding disability accommodation.*" (Italics added.)

During trial, SFHA moved to dismiss Myres's complaint on the ground that her claims were all barred "as a matter of law" by the release. After postponing a ruling on the motion, the court eventually denied it. Nonetheless, prior to that ruling, the trial court denied the motion to exclude the release. The release, along with the accompanying MOU, was admitted, read to the jury in its entirety, and referenced throughout trial.

On Myres's request, the trial court gave a limiting instruction that informed the jury it could not use the release "for purposes of trying to decide whether she released her claims in this lawsuit. . . . [¶] . . . She didn't forfeit her right to come into court and file a complaint." Prior to argument the trial court told Myres's counsel, "[T]he defense is not going to allege that there was a waiver. The first sentence [of the limiting instruction]

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provision has no application where the evidence is not tendered as an admission of weakness by the party who settled or offered to settle, but for some other purpose." (*Lemer v. Boise Cascade, Inc.* (1980) 107 Cal.App.3d 1, 9.)

says that. If you think that they're using the release in an improper manner in their argument, you can raise that with me."

b. *Analysis*

Myres maintains that, by the time the motion to dismiss was denied and the limiting instruction was given, damage from admission of the release was already done and could not be cured. SFHA argues that the trial court did not abuse its discretion in admitting the MOU and release because they were relevant to Myres's credibility and state of mind.

According to SFHA, "the documents demonstrate that [Myres] was well-aware of SFHA's anti-discrimination policies, as well as its grievance procedures, yet [Myres] failed to make any complaints to her superiors at SFHA or her . . . union representative regarding the discrimination that allegedly took place when she returned to work . . . . She did not raise the issue of the supposed discrimination at the time she signed the Claims Release Form." We agree with the trial court and SFHA that evidence that Myres signed the release, without complaining or asking questions of her union representative, is relevant to her credibility as it has some tendency to show her state of mind regarding her complaints at the time she was laid off.

In any event, any prejudice caused by the admission of the release was avoided by the trial court's curative instruction. The trial court specifically instructed the jury that it could not use the release to conclude Myres's claims were barred. We presume that the jury followed this instruction. (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 808.)

B. *SFHA's Appeal*

SFHA's appeal challenges the jury's harassment verdict. Specifically, SFHA argues: (1) the jury's verdict on hostile work environment harassment is not supported by substantial evidence; (2) misconduct by Myres's counsel likely impacted the verdict; and (3) the trial court erred in imposing postjudgment interest at a rate in excess of 7 percent.

1. *Substantial Evidence to Support Harassment Verdict*

SFHA focuses primarily on its contention that the jury verdict for hostile work environment harassment is not supported by substantial evidence.[11] When a jury verdict is challenged as being unsupported, we review for substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on another ground as noted in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.) In doing so, we " 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' " (*Bickel*, at p. 1053.) Our power " ' "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.]' " (*Ibid.*) "There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all reasonable inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word

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[11] SFHA makes a related, but separate, argument that the trial court erred in denying its motion for judgment notwithstanding the verdict. We do not address this argument, nor Myres's contention that the trial court was without jurisdiction to consider such a motion. The order denying judgment notwithstanding the verdict was a separately appealable order that SFHA did not designate in its notice of appeal. (Code Civ. Proc., § 904.1, subd. (a)(4); *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 [if order is appealable, an appeal must be taken or the right to appellate review is forfeited]; *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247.) SFHA acknowledges in its reply brief that it "appealed from the judgment, not the court order denying JNOV."

cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.] The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record. [Citation.] While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632–1633, italics & fns. omitted.)

a. *Background*

Myres testified that, between 2008 and 2010, Alvarez had told her periodically—because of her role as the "workers' comp person"—that other SFHA employees taking workers' compensation leave were "malingerers," abused the system, and filed "fraudulent claims."

Myres's former coworker, Linda Burnett, testified that while Myres was out on leave after her surgery, Alvarez asked at a senior staff meeting addressing workers' compensation issues, "How can the workers' comp person be out on workers' comp?"[12] Alvarez's tone was "sarcastic" or "sneering." Myres was not present at the meeting when the comment was made and only learned of the comment later from Burnett. Burnett testified that when she told Myres about the remarks, Myres appeared to look "a little upset."

Alvarez subsequently made a remark in a lunchroom full of employees following Myres's return to work on May 19, 2010. Myres testified: "The first occasion that [Alvarez] said something to me was when I came out of the restroom . . . and just into the lunchroom to throw the paper towel away and [Alvarez] saw me walk in. . . . [¶] . . . [¶] He wanted to know why I was still walking with crutches, and he also said that when he had his knee injury or whatever, something to the effect, that he was walking around a

[12] Burnett's testimony was corroborated by other witnesses who overheard the question.

track with a cane or something. [¶] . . . [¶] . . . He didn't have two crutches. And it was kind of noisy. People were talking when I first walked in. But when [Alvarez] started talking, everything got quiet. [¶] . . . [¶] . . . [T]he way I took it was criticizing because it was three months after the surgery and I was still on crutches. So I didn't say anything back. I just . . . turned around and walked out." Myres reported the comment to Crawford, among others. At trial, Alvarez denied making the remark or having had a similar knee injury.

As a result of the office move, boxes were still on the floor near Myres's desk. Myres testified: "[Alvarez] came back to where I was sitting in the cubicle area. He was doing a walk through the . . . department, and that was still in May. He came back, and he saw these boxes around. He was talking about the file cabinets and these boxes were all around and he asked who did they belong to, and I said I presume they go with my desk . . . . [¶] He says, 'I want them unpacked. I want these boxes out of here.' And I attempted to explain to him that I had lifting restrictions and I was on two crutches and I couldn't very well do that, and he just says, 'I don't care. Get it done.' [¶] . . . [¶] I was a bit unnerved by it. I was upset. . . . [¶] . . . [¶] . . . [B]ut [a coworker] came back to me and said, 'Do you know what you can do is call one of the laborers to come move the boxes for you.' And so that's what I did."

The fourth interaction occurred towards the end of May 2010. Myres testified: "I was walking to the elevator. It was a little after 12:00. I was leaving for the day. He was coming from the elevator into the hallway making that left headed down towards his office, and he had—Tim Larsen was with him and I think [another person]. [¶] And because crutches make a distinctive noise, especially when you're on tile or a hard surface, and he heard them clicking as I was walking to the elevator, and he turned around and looked at me and he turned back around. And he said, 'When I get in my office, remind me to look in my budget so I can see if I have enough money in there to buy an electric scooter, a Lark,' . . . . So he turned back around, and he's laughing. . . . [Larsen] turned back around, and he was laughing. . . . [¶] That was offensive to me because it appeared that I was the brunt of a joke, that he was making fun of my

disability. It was really offensive and he always did these things when other people were around. . . . It was not only embarrassing, but it was humiliating because I was struggling to stay at work. I was struggling to walk with crutches."

At SFHA's request, the trial court instructed the jury on the "severe or pervasive" standard for a harassment claim by giving CACI No. 2524. The court instructed: "Severe or pervasive . . . means conduct that alters the conditions of employment and creates a hostile or abusive work environment. In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any or all of the following: [¶] A[.] the nature of the conduct. [¶] B[.] how often and over what period of time the conduct occurred. [¶] C[.] the circumstances under which the conduct occurred. [¶] D[.] whether the conduct was physically threatening or humiliating. [¶] E[.] the extent to which the conduct unreasonably interfered with an employee's work performance."

SFHA also requested that the trial court give the following special jury instruction: "To be actionable, harassment based on disability must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile working environment. The acts of harassment cannot be occasional, isolated, sporadic, or trivial: rather [Myres] must show a concerted pattern of harassment of a repeated, [routine], or a generalized nature. Simple teasing and offhand comments are not actionable." The trial court refused SFHA's proposed special jury instruction, concluding that it was duplicative of CACI No. 2524.

b. *Analysis*

Pursuant to CACI No. 2521A, the trial court instructed the jury that, to establish her claim of hostile work environment disability harassment, Myres must prove: "One, that she was an employee of [SFHA]. And two, that she was subjected to unwanted harassing conduct because she was a person with a physical disability. Three, *that the harassing conduct was severe or pervasive*. And four, *that a reasonable disabled person in her circumstances would have considered the work environment to be hostile or abusive*. And five, that [Myres] considered the work environment to be hostile or

abusive. Six, that an agent or supervisor engaged in the conduct. Seven, that [Myres] was harmed. And eight, that *the conduct was a substantial factor in causing* [*Myres's*] *harm*." (Italics added.) SFHA contends that the jury's verdict is not supported by substantial evidence on italicized elements three, four, and eight.[13]

SFHA's main argument is that the verdict is not supported by substantial evidence because any harassment was not "pervasive or severe." Because little authority addresses disability harassment under FEHA, we rely largely, as do the parties, on cases involving sexual harassment. In order to prevail on such a claim, an employee "must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [protected characteristic]." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462 (*Miller*).) "[H]arassment that is occasional, isolated, sporadic, or trivial" generally fails to meet this standard. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*).) This standard has both a subjective and objective component: "[A] plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception." (*Id.* at p. 284.) "The working environment must be evaluated in light of the totality of the circumstances . . . . These may include 'the frequency of the

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[13] We do not address SFHA's conclusory argument with respect to element eight. SFHA forfeited the argument by failing to adequately develop it as an independent argument. (See, e.g., *Lona v. Citbank, N.A., supra*, 202 Cal.App.4th at pp. 96-97, fn. 2.) SFHA also argues that "there is no substantial evidence that SFHA knew or should have known of the alleged harassing conduct and failed to take immediate and appropriate corrective action." We reject this argument because it was not a basis for SFHA's liability. "[W]hen harassment is by a *nonsupervisory* employee, an employer's liability is predicated not on the conduct itself, but on the employer's response once it learns of the conduct. [Citation.]" (*Bradley v. California Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1631, italics added.) However, an employer is strictly liable for the conduct of its supervisors. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 (*Roby*); *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034.)

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' [Citation.]" (*Miller,* at p. 462, quoting *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23.)

To be pervasive, the harassing conduct must consist of "more than a few isolated incidents." (*Lyle, supra,* 38 Cal.4th at p. 284.) " '[T]here is neither a threshold "magic number" of harassing incidents that gives rise . . . to liability . . . nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.' [Citation.]" (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36.) But a single incidence of " 'gruff,' 'abrupt,' and 'intimidating' behavior . . . is not sufficiently severe to constitute a hostile working environment." (*Lawler v. Montblanc N. Am., LLC* (9th Cir. 2013) 704 F.3d 1235, 1245.) "The conduct must be extreme: ' "simple teasing," [citation] offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' [Citation.]" (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377.)

" '[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." [Citation.] . . . . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.' [Citations.]" (*Miller, supra,* 36 Cal.4th at p. 462.)

In its opening brief, SFHA relies on *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457 (*Etter*) to suggest that the trial court misinstructed the jury on hostile work

environmental harassment. In *Etter*, our colleagues in Division One held that the trial court did not err in instructing the jury that " 'occasional, isolated, sporadic, or trivial' " acts of harassment are not actionable. (*Id.* at pp. 459–460.)

After a jury verdict in favor of the defendant, the plaintiff in *Etter* appealed, arguing that the language of the form jury instruction misstates the law in that it makes the determinative factor the frequency of the conduct. (*Etter, supra,* 67 Cal.App.4th at pp. 460, 466.) The reviewing court recognized that the instructional language originated in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590 (*Fisher*).[14] (*Etter,* at pp. 465–466.) The court further acknowledged that "frequency" was only one of several factors to be considered, but explained that such "does not negate the principle articulated in *Fisher* that a hostile working environment requires more than occasional and isolated incidents of harassment." (*Id.* at p. 466, fn. omitted.) The court concluded: "The challenged language that the acts must be more than occasional, isolated, sporadic (i.e., pervasive), or trivial (i.e., severe) was consistent with the legal standard. [¶] . . . [W]e find no error in the jury instruction given here." (*Id.* at p. 467.)

In its opening brief, SFHA seeks to turn *Etter, supra,* 67 Cal.App.4th 457 on its head by contending that the trial court in this case erred by declining to give a similar instruction. In its reply brief, SFHA backs away from the argument, stating that its "appeal stems from the *judgment*, which is not supported by substantial evidence, not from the trial court's declination to give the special jury instruction." We are left confused by SFHA's briefing. But one thing is clear—the *Etter* court did not consider, much less hold, that such an instruction was required. In fact, the court specifically

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[14] "The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. [Citation.] [¶] In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher, supra,* 214 Cal.App.3d at p. 610.)

noted: "We are aware that the new BAJI No. 12.05 identifies the *Harris* [*v. Forklift Systems, Inc., supra,* 510 U.S. 17,] factors without mentioning that 'occasional, isolated, sporadic, or trivial' conduct is not actionable. Because that instruction is not before us, we express no opinion about it. We do not suggest that the instruction given here was a model instruction, only that it was not erroneous." (*Etter,* at p. 467, fn. 8.) SFHA has pointed us to no authority, and we have found none through our independent investigation, suggesting that the *Etter* instruction is required.

Returning to its substantial evidence argument, SFHA suggests that the hostile work environment verdict is unsupported because the facts are not as strong as those found in *Roby, supra,* 47 Cal.4th 686. In *Roby,* the plaintiff suffered from a disability that caused panic attacks, which restricted her ability to perform her job. The plaintiff's medication caused her body to produce an unpleasant odor, and in connection with her panic attacks she also developed a nervous disorder that caused her to dig her fingernails into the skin of her arms, producing open sores. (*Id.* at pp. 694–695.) Her supervisor made negative comments in front of other workers about the plaintiff's body odor, called her " 'disgusting' " because of the sores, and openly ostracized and belittled her in the office. The supervisor ignored the plaintiff at meetings, called the plaintiff's job a " 'no brainer,' " overlooked her when handing out gifts, and excluded her from office parties. When the plaintiff would telephone the office to report that she would be absent, her supervisor " 'would always make this announcement that was degrading; say, "Charlene's absent again"—you know—that type of response.' " (*Id.* at p. 695.)

Our Supreme Court reversed the Court of Appeal's conclusion that the plaintiff's evidence was insufficient to support a harassment verdict. (*Roby, supra,* 47 Cal.4th at pp. 693, 710.) Specifically, the Court of Appeal had erred by allocating the plaintiff's evidence between her discrimination claim and her harassment claim, and then ignoring the discrimination evidence when analyzing the harassment verdict. (*Id.* at pp. 709–710.) The high court observed: "Here, the evidence is ample to support the jury's harassment verdict. The evidence included not only [the supervisor's] rude comments and behavior, which occurred on a daily basis, but also [the supervisor's] shunning of [the plaintiff]

during weekly staff meetings, [the supervisor's] belittling of [the plaintiff's] job, and [the supervisor's] reprimands of [the plaintiff] in front of [the plaintiff's] coworkers. This evidence was sufficient to allow the jury to conclude that the hostility was pervasive and effectively changed the conditions of [the plaintiff's] employment." (*Id.* at p. 710.)

SFHA contends that Alvarez's remarks "do not compare in severity or pervasiveness to the harassing conduct in the *Roby* case." We agree that Alvarez's remarks were not as pervasive as those at issue in *Roby*. But, this is of little assistance to us here. The comments are actually quite similar in their substance and severity. And *Roby* did not consider whether equally severe, but less pervasive harassment would be insufficient to support a hostile work environment verdict. Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

SFHA fares no better in its attempt to discount the comments alleged to have been made by Alvarez, by contradicting them with Alvarez's testimony, by characterizing them as "offhand jokes," or by asserting that his comment at the senior staff meeting "was appropriate within the context made, given that . . . Alvarez and the SFHA were under criticism and mandate . . . to reduce the high volume of workers' compensation claims." SFHA asks us to weigh the evidence and make all inferences in its favor. This we cannot do. (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1234 (*Fuentes*); *Kuhn v. Department of General Services, supra*, 22 Cal.App.4th at pp. 1632–1633.) A respondent may have introduced evidence to dispute much of the appellant's testimony at trial. However, when reviewing a jury's verdict we disregard such evidence. (*McCoy, supra,* 216 Cal.App.4th at p. 300.)

Fuentes, supra, 200 Cal.App.4th 1221 is instructive. In *Fuentes,* a female employee of an auto parts retailer complained of several comments made to her by her supervisors, in front of coworkers and customers, as well as comments made behind her back over four weeks' time. (*Id.* at pp. 1224–1225.) Specifically, the employee testified that her supervisors spread rumors that she had herpes, which she had contracted from a purported sexual relationship with a coworker. The supervisors also suggested to the female employee that she could make more money working as a stripper or a swimsuit

model. In one incident, the supervisor physically turned the employee around to display her buttocks to customers, and later told her that, if she and he owned the store, they could be rich because all she had to do " 'was just turn around and show them [her] butt.' " (*Id.* at pp. 1225, 1228–1231.) On other occasions, the supervisors referred to good-looking women customers as cougars, talked about strippers, and invited the employee to a strip club. (*Id.* at p. 1231.)

On appeal, the employer challenged the jury's sexual harassment verdict, in favor of the plaintiff, on the ground that it was unsupported by substantial evidence. (*Fuentes, supra,* 200 Cal.App.4th at p. 1224.) The court rejected the argument, reasoning that inconsistencies and contradictions in trial testimony are to be resolved by the jury. The court further observed: "We infer the jury credited Fuentes's testimony and the testimony corroborating it in light of the unanimous verdicts on liability. [¶] . . . Fuentes was made the object of sexual humiliation and exploitation for the entertainment of managers, employees . . . , and customers. [Citation.] When Garcia was confronted by Fuentes about the herpes rumor, he threatened to fire her if she raised the issue again. Significantly, he supported his threat by referring to a fictitious photograph of Fuentes kissing [a coworker], another sexual reference. [¶] While these events occurred over a compressed period of time, the approximately three weeks between May 27, 2003 and June 19, 2003, we find substantial evidence that the harassment suffered by Fuentes was both pervasive and severe. . . . The incidents in which Garcia directed Fuentes to use her body to increase sales were physically humiliating. . . . The customers cheered and laughed at her . . . ." (*Id.* at pp. 1234–1235.)

Here, just as in *Fuentes*, the comments directed at Myres were made within a very short period of time—approximately three weeks. And just as in *Fuentes*, belittling and humiliating comments were made by a supervisor directly to Myres in front of coworkers. It is true, as SFHA points out, that Alvarez was not Myres's "immediate supervisor." However, Alvarez was SFHA's executive director and had authority to terminate Myres and other SFHA employees. In fact, the harassment Myres suffered was especially injurious to Myres precisely because of Alvarez's position. (See *Roby, supra,*

47 Cal.4th at p. 707 ["harassment by a high-level manager of an organization may be more injurious to the victim because of the prestige and authority that the manager enjoys"]; *Dee v. Vintage Petroleum, Inc*., *supra*, 106 Cal.App.4th at p. 36 [a single harassing remark by a supervisor may be sufficient to support a claim for hostile work environment].)

We recognize that the harassing conduct at issue in *Fuentes, supra,* 200 Cal.App.4th 1221 was more severe and physically degrading than Alvarez's. But the humiliating comments directed at Myres were part of Alvarez's more widespread pattern of disparaging comments against injured workers.

" 'The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others.' " (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519.) "There is no requirement that a plaintiff alleging such conduct be the direct target of the harassment; however, '. . . conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff.' ([*Lyle*], *supra*, 38 Cal.4th at pp. 284–285.) In such cases, it is necessary 'to establish that the sexually harassing conduct permeated the plaintiff's direct work environment.' (*Fisher*[, *supra,*] 214 Cal.App.3d [at p.] 610 . . . .)" (*McCoy, supra,* 216 Cal.App.4th at p. 293.)

" 'Evidence of the general work atmosphere, involving employees other than the plaintiff, is relevant to the issue of whether there existed an atmosphere of hostile work environment. . . .' [Citation.] Therefore, one who is personally subjected to offensive remarks and touchings can establish a hostile work environment by showing that harassment existed in the place of employment."[15] (*Fisher, supra,* 214 Cal.App.3d at pp. 610–611.)

Myres periodically heard comments from Alvarez suggesting that employees who took workers' compensation leave were "malingerers" and abusing the system. Myres

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[15] If a plaintiff neither witnesses an incident of harassment nor knows that it occurred, the incident is irrelevant. (*Beyda v. City of Los Angeles*, *supra,* 65 Cal.App.4th at p. 519.)

later learned that Alvarez had asked a sarcastic, rhetorical question about her workers' compensation leave during a senior staff meeting. And Myres's entire role at SFHA focused on handling workers' compensation claims for injured workers. Of course, these circumstances would impact the way a reasonable person in Myres's position would be effected by Alvarez's subsequent demeaning jokes and questions. We cannot agree that "[b]y any objective standard, the comments made by [Alvarez] would not be so offensive or abusive as to create a hostile or abusive working environment." Considering all the circumstances " 'from the perspective of a reasonable person in the plaintiff's position' " (*Miller, supra,* 36 Cal.4th at p. 462), a trier of fact could reasonably conclude these events constituted a pattern of disability harassment that created a hostile work environment. The jury's verdict is supported by substantial evidence.

SFHA's reliance on *McCoy, supra,* 216 Cal.App.4th 283 and *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*) does not convince us to reach a contrary conclusion. In *McCoy*, the Second District Court of Appeal affirmed summary adjudication, in favor of the employer, on the ground that "the harassment was not so severe and pervasive as to alter the conditions of [the plaintiff's] employment." (*McCoy*, at p. 289.) On appeal, the plaintiff pointed to evidence that her coworkers had made approximately five to nine comments about other women's bodies, including referring to one as having a " 'J-Lo ass' " or a " 'nigger ass.' " (*Id.* at pp. 293–294.) One of the plaintiff's coworkers had also once ogled and made gestures toward one of the women and speculated as to who another woman was sexually involved with. (*Ibid*.) The reviewing court concluded this evidence was insufficient, reasoning as follows: "Over the four months [the plaintiff] was working in the vessel planner's office, comments were made on, at most, nine, and possibly as few as five occasions. Although the details of most of the comments were vague, they involved discussion of other women's bodies outside their presence. [The plaintiff] did not claim any sexual comment or conduct was directed at her. . . . [¶] In addition, . . . [the coworker who made these comments] was not her supervisor, but rather a vessel planner charged with partial responsibility for training her. In order to be actionable, it must be shown that [the employer] knew, or should have

known, of the alleged harassment and failed to take appropriate action. [Citations.] [The plaintiff] admitted she never mentioned to anyone in management that [her coworker] made these remarks about other women. Nor was there evidence that she ever mentioned anything about sexual harassment to management." (*Id.* at p. 294, italics omitted.)

McCoy is distinguishable because, in that case, all of the offensive comments were directed at women other than the plaintiff. Here, in contrast, there was evidence of Alvarez's generalized disparaging comments, as well as four instances of humiliating comments directed at Myres specifically.

In *Mokler, supra,* 157 Cal.App.4th 121, a female county employee alleged she had been sexually harassed by a county supervisor (Norby) who had made several inappropriate comments over the course of three meetings in approximately two months. Specifically, the plaintiff testified that, upon first meeting, Norby asked if she was married, and when she said no, he replied, " 'So you're the aging nun.' " (*Id.* at p. 131.) On the next occasion, Norby had pulled her to him so that the sides of their bodies were touching, had complimented her legs, and had asked her flirtatiously, " 'Did you come here to lobby me?' " (*Id.* at pp. 131–132.) On the third occasion, Norby repeatedly put his arm around the plaintiff, asked for her address, and rubbed her breast with his arm. (*Id.* at p. 132.)

The defendants appealed the trial court's denial of a motion for judgment notwithstanding the verdict. (*Mokler, supra,* 157 Cal.App.4th at p. 133.) The reviewing court reversed the trial court's order denying the motion on the plaintiff's FEHA claim for sexual harassment, concluding that the jury's harassment verdict was not supported by substantial evidence. (*Id.* at pp. 145–146.) The court reasoned: "Here, we note Norby's harassment of [the plaintiff] occurred on three occasions over a five-week period, and involved no physical threats. [¶] . . . [¶] Following established precedent, we conclude these acts of harassment fall short of establishing 'a pattern of continuous, pervasive harassment' [citation], necessary to show a hostile working environment under FEHA. *Norby did not supervise* [*the plaintiff*] *or work in the same building with her*. The first incident involved no touching or sexual remarks; rather, Norby uttered an

isolated but boorish comment on [the plaintiff's] marital status. The second incident did not occur at work, and involved a minor suggestive remark and nonsexual touching. The third incident involved touching when Norby placed his arm around [the plaintiff] and rubbed his arm against her breast in the process. The touching, however, was brief and did not constitute an extreme act of harassment. Norby's request for [the plaintiff's] home address was brazen, but this conduct falls short of what the law requires to establish a hostile work environment." (*Id.* at p. 144, italics added.)

Here, in contrast to *Mokler*, the harassment was conducted by a supervisor. Furthermore, all of the complained of incidents occurred at Myres's workplace, unlike *Mokler*, where at least one of the three incidents occurred in nonwork settings.

2. *Attorney Misconduct*

SFHA also argues that Myres's counsel committed misconduct—by alluding to improper "me too" evidence in her opening statement and repeatedly asking overly broad questions—and that without this misconduct there was a reasonable probability SFHA would have obtained a more favorable result.

a. *Background*

Before trial, SFHA filed a motion in limine that sought to exclude, pursuant to Evidence Code sections 352 and 1101, subdivision (a), all evidence or argument that Alvarez allegedly harassed or punished nonsimilarly situated employees.[16] Specifically,

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[16] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Evidence Code, section 1101 provides, in relevant part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, *intent*, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Italics added.)

SFHA sought to limit admissible "me too" evidence to "[f]irsthand testimony by other employees that they were discriminated against based on their disability." (Italics omitted.) Myres opposed the motion, arguing that evidence of discrimination from other SFHA employees who sought protected leave on a basis not related to disability was admissible to prove Alvarez's discriminatory motive for terminating her employment.

The trial court denied SFHA's motion without prejudice. But, the court explained: "[I]f the questions relate to [Alvarez] and his attitude and his statements about other people who had disabilities, and he made statements that showed that he was hostile to them or that he was inclined to discriminate against them or that he did discriminate against them, they can bring it out. [¶] . . . [¶] [I]f it is maternity leave, that is different. If it is racial discrimination, that may be different. But these are trial issues that I can deal with right on the spot . . . ." Eventually, the court ruled that admissible "me too" evidence would be limited to evidence of disability discrimination, including workers' compensation. The court later explained: "I'm not inclined to change my ruling. This is a disability case and so it's illegal conduct towards those who are disabled and not others. That's the Court's ruling."

Myres's opening statement alluded to evidence of Alvarez's generalized bad treatment of workers and bias against members of other protected groups. Specifically, Myres's counsel argued: "You will see that [Alvarez] . . . was particularly abusive towards workers with injuries and disabilities. Witnesses who worked in high level positions alongside Director Alvarez will testify to his intimidating management style. [¶] . . . [¶] *During meetings with his executive staff,* [*Alvarez*] *was known to make comments such as 'No white lesbian is going to tell me what to do,' and would complain that there are too many Asians in finance.* [¶] *On yet another occasion, he told his acting general counsel, . . . a white man, that he was not going to be promoted to general counsel because there wasn't enough kink in his hair.* [¶] As you will learn, Director Alvarez laid off other workers who took protected medical leave. Mr. Alvarez's special assistant, Roger Crawford, . . . took family medical leave, only to return and find that Director Alvarez had stripped him of his responsibilities." (Italics added.) SFHA did not object.

But after the conclusion of Myres's opening statement, SFHA asked the court to instruct the jury to disregard any reference to Alvarez's racial bias made in counsel's opening statement. The court agreed to take the matter under submission. The parties have not pointed us to any resolution of this issue.

b. *Analysis*

SFHA asserts that Myres's counsel engaged in misconduct by asserting facts during opening statement that she knew would not be shown at trial, given the court's ruling on the "me too" motion in limine. Although SFHA points out other instances of alleged misconduct, we agree with Myres that this is the only instance of alleged misconduct to which SFHA arguably preserved an objection. " 'Generally, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial.' [Citation.] In addition to objecting, a litigant faced with opposing counsel's misconduct must also 'move for a mistrial or seek a curative admonition' [citation] unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice [citation]. This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' [Citation.] The rule is the same for civil and criminal cases. [Citation.] However, 'the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." ' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794–795.) SFHA only sought an admonition with respect to counsel's opening statement.

Even if we assume that Myres's counsel committed misconduct in her opening statement, we would not reverse because any error was not prejudicial. Such misconduct constitutes prejudicial error only if it is reasonably probable that SFHA would have achieved a more favorable result in the absence of that portion of Myres's opening statement. (*Cassim, supra,* 33 Cal.4th at p. 802.) The offending argument was fleeting. The trial court also instructed the jury, in accordance with CACI No. 106, that the

attorneys' opening statements and closing arguments were not evidence. We cannot assume that the jurors ignored these instructions. (*Saari v. Jongordon Corp., supra,* 5 Cal.App.4th at p. 808.) Upon our review of the evidence, the jury instructions, and the entirety of Myres's counsel's opening statement, we conclude that any misconduct was harmless. SFHA has not shown an abuse of discretion.

3. *Postjudgment Interest*

In its final argument, SFHA challenges the rate of postjudgment interest awarded to Myres. SFHA argues that 7 percent is the applicable rate of postjudgment interest, rather than the 10 percent awarded, because SFHA is a "local public entity." Myres concedes the argument by failing to respond. We agree that the correct rate of postjudgment interest in this case is 7 percent per year. (Cal. Const., art. XV, § 1; § 970.1, subd. (c); *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 347–348, 352–353; see also *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009.)

III. DISPOSITION

The judgment is modified to impose postjudgment interest at 7 percent per year. The judgment is affirmed in all other respects. The parties are to bear their own costs on appeal.

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BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.